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SUPREME COURT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 81 5026

RONALD DOUTHIT,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

Pamela L. J. Arangno
Millard C. Farmer
Joseph M. Nursey
Andrea I. Young

ATTORNEYS FOR PETITIONER

15 Peachtree Street, N.E.
Suite 831
Atlanta, Georgia 30303

(404) 688-8116

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-

RONALD DOUTHIT,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

Petitioner, Ronald Douthit, prays that a writ of certiorari be issued to review the judgment of the Superior Court of Butts County, Georgia entered on November 14, 1980. Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia April 13, 1981.

CITITATIONS TO OPINION BELOW

Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on April 13, 1981. The order of the Supreme Court of Georgia and the unreported opinion of the Superior Court of Butts County are set out in Appendices A and B respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the judgment of the Superior Court of Butts County was sought in the Supreme Court of Georgia pursuant to Ga. Code Ann. §24-4526. Review was denied April 13, 1981. Pursuant to Rule 20 of the Rules of the Supreme Court, the time for this Petition runs from the denial of review issued by the Supreme Court of Georgia on April 13, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia, the texts of which are set out in Appendix C hereto:

Georgia Code Ann. §24-4526
Georgia Code Ann. §26-1101
Georgia Code Ann. §38-801(d)
Georgia Code Ann. §50-127
Georgia Code Ann. §27-2534.1(b)(4)

QUESTION PRESENTED

Whether Petitioner was denied the effective assistance of counsel pre-trial, in the guilt/innocence phase of trial and at the sentencing phase of trial in a capital case where the sentence of death was imposed in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

HOW THE ISSUE WAS RAISED BELOW

Petitioner's state Petition for Writ of Habeas Corpus filed in the Superior Court of Butts County, Georgia, pursuant to Ga. Code Ann. §50-127 raised the constitutional issue of ineffective assistance of trial counsel. The habeas corpus court considered the merits of the issue and found against Petitioner. The constitutional issue was raised again on application for certificate of probable cause to appeal in the Supreme Court of Georgia which denied the application.

STATEMENT OF THE CASE

In January, 1976, Petitioner, Ronald Douthit was convicted of murder and sentenced to death in the Superior Court of Cobb County, Georgia. The judgment and sentence was affirmed by the Georgia Supreme Court in Douthit v. State, 239 Ga. 81, 235 S.E. 2d 493 (1977).

On June 19, 1978, Petitioner filed an extraordinary motion for new trial in the Superior Court of Cobb County; the motion was denied and the Georgia Supreme Court affirmed. Douthit v. State, 244 Ga. 471; 260 S.E. 2d 875 (1979). Certiorari was denied by this Court. Douthit v. Georgia, 445 U.S. 938 (1980).

On May 20, 1980, Petitioner filed a Petitioner for Writ for Habeas Corpus in the Superior Court of Butts County, Georgia. The petition was denied on November 14, 1980 (Appendix B); an application for certificate of probable cause to appeal was denied by the Georgia Supreme Court on April 13, 1981 (Appendix A).

On January 9, 1976, Petitioner, Ronald Douthit was indicted for the December 17, 1975 death of his first cousin, Leonard Frazier. Ronald Douthit and a cousin, Rodney Dulaney, were both charged with the crime.

The evidence at trial did not place Petitioner at the scene of the crime.[1] Rather, the prosecution was based on a

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1. Findings of Fact, Habeas Corpus Court (App. B at p. 8).

theory of conspiracy. The State suggested that Frazier had been murdered for insurance proceeds.

The State presented evidence at trial that on September 28, 1975, Petitioner had purchased a $15,000 policy on the life of Leonard Frazier with Frazier's father named as the beneficiary.[2]

Under the provisions of the policy, the premiums were to be paid monthly by automatic bank check from Petitioner's bank account at the C&S Bank; that is, the insurance company (Lincoln National Life) would automatically draw the money from Petitioner's bank account (T Trial 219, 326, 237, R Habeas Corpus 350, 456, 457; State's Trial Exhibit 22, R Habeas Corpus 588-620).

On November 22, 1975 someone, purporting to be Leonard Frazier, telephoned Jefferey Faircloth, the agent for the life insurance company and convinced Faircloth, without a personal meeting, to change the beneficiary of the life insurance policy from Frazier's father to the Petitioner, Ronald Douthit. Faircloth testified that he was familiar with Ronald Douthit's voice and that the person who called to effect the change of beneficiary was not Ronald Douthit (T. Trial 219-221, 229-230, R Habeas Corpus 350-352, 360-361).

On December 17, 1975, Leonard Frazier's body was found on the side of the Log Cabin Drive in Smyrna, Georgia. He had been shot three times by a .22 caliber firearm (T Trial 72, 104, 150, R Habeas Corpus 203, 234, 281).

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2. Frazier was employed at Petitioner's canine kennel; Petitioner had also purchased a major medical health insurance policy for Frazier (T Trial 216-217, R Habeas Corpus 347-348).

Later on December 17, 1975, Sgt. Doug Williams of the Cobb County, Georgia Police Department obtained a warrant for the search of Petitioner's residence.[3] The facts available to law enforcement authorities at the time the warrant was obtained were: the discovery of Leonard Frazier's body; the autopsy report showing the cause of death to be gunshot wounds; and statements by Leonard Frazier's brothers that Petitioner had obtained an insurance policy on the life of Leonard Frazier. Sgt. Williams also testified that he had received "information" (the informant was not named) that at some unspecified time in the past, Petitioner had threatened the life of Leonard Frazier (T Preliminary Hearing 5-14, R Habeas Corpus 883-892). No facts were given to show reason to believe that evidence of the crime could be found at Petitioner's residence.

Sgt. Williams and other members of the Cobb County Police Department executed the search of Petitioner's residence on December 17 (T Trial 283-284, R Habeas Corpus 414-415). Petitioner was not at home when the police arrived to conduct the search; however, Petitioner, Ronald Douthit, arrived while the police were searching his home and was arrested immediately upon his arrival (T Trial 288-290; 304-305, R Habeas Corpus 419-421; 434-435).

Pursuant to the search of Petitioner's residence, police officers seized a piece of screen with a red stain

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3. Petitioner's co-indictee, Rodney Dulaney, at that time, also lived at Petitioner's residence. (T Preliminary Hearing 14, R Habeas Corpus 892).

from the basement of the residence (T Trial 286-287, R Habeas Corpus 302-303); the red stain on the screen was found to contain human blood (T Trial 272-274, R Habeas Corpus 403-405). This screen was introduced against Petitioner at trial (State's Trial Exhibit No. 17).

Petitioner was questioned by police officers at his residence pursuant to the arrest. Petitioner allegedly made statements consistent with innocence, indicating that Rodney Dulaney was responsible for Frazier's death. However, according to the State's evidence, Petitioner admitted knowledge of the location of a .22 caliber pistol and led police officers to the location of this pistol and allegedly admitted knowledge of Rodney Dulaney moving the body. The statement and the weapon were introduced against Petitioner at his trial (T Trial 306-310, 334-336, R Habeas Corpus 436-440, 464-466; State's Trial Exhibit No. 12, R Habeas Corpus 542).

The State's evidence showed that Rodney Dulaney had possession of the murder weapon prior to the offense and had threatened other persons with the weapon (T Trial 180-181; 243, R Habeas Corpus 311-314; 373). No evidence was presented that indicated that Petitioner had possession of the weapon prior to the offense.[4]

The State further presented testimony of Roy Ursin of the Lincoln National Life Insurance Company. Mr. Ursin testified that the insurance policy on the life of Leonard Frazier with Ronald Douthit named as beneficiary was in effect

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4. Testimony at Rodney Dulaney's trial also indicated that after his arrest, Dulaney made telephone calls from the jail threatening State's witnesses (T Rodney Dulaney Trial 130-131 R Habeas Corpus 755-756). No such threats were made by Ronald Douthit.

on December 15, 1975, the date of Leonard Frazier's death. Mr. Ursin also testified concerning the automatic bank check provision for payment of the premiums (T Trial 318-326, R Habeas Corpus 448-456). See, p. 4, supra.

Petitioner's trial counsel made no motions to suppress either Petitioner's statements or evidence seized pursuant to the search of Petitioner's residence. Petitioner's trial counsel waived his right to make an opening statement to the jury at trial, then presented no evidence at either the guilt/innocence phase or the sentencing phase at trial.

Petitioner was convicted of murder and at the sentencing phase of the bifurcated trial was sentenced to death. The sole aggravating circumstance found by the jury in support of the death penalty was that the "offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value" Ga. Code Ann. §27-2534.1(b)(4). (T Trial 392-393, R Habeas Corpus 522-523).

Rodney Dulaney, tried separately, was convicted of murder and sentenced to life imprisonment. (R Habeas Corpus 67).

The State Habeas Corpus Proceeding

Petitioner's state habeas corpus proceeding in the Superior Court of Butts County, Georgia presented a vastly different perspective on the evidence in contrast to the perspective presented at trial.

The evidence presented at Petitioner's state habeas corpus proceeding included the testimony of Eugene Deal,

Petitioner's trial counsel[5], the testimony of George Darden, the District Attorney at Petitioner's trial, the testimony of Charles Norman, a former prosecuting attorney now in private practice and the testimony of Petitioner and his sister and grandmother. Petitioner also presented affidavits[6] of bank officials and seven (7) affidavits of persons who have known Petitioner all of his life and could have offered substantial evidence in mitigation of sentence at the penalty phase of Petitioner's trial.

At trial, the State's theory of motive for the death of Leonard Frazier was that Petitioner killed Frazier to collect the proceeds of the life insurance policy. The sole aggravating circumstance found by the jury in imposing the death penalty was that Petitioner killed Frazier for monetary gain. As George Darden, the District Attonrey who prosecuted Petitioner, testified at the state habeas corpus proceeding:

> "Q. [By Mr. Nursey]: You stated that the aggravating circumstance was that the murder was commited for pecuniary gain, is that correct?
>
> A. [By Mr. Darden]: That's correct.
>
> Q. So extremely relevant to that aggravating circumstance would be the validity of the insurance policy in this case would it not, and the knowledge of the person charged having -- of the validity of the insurance policy?
>
> A. Those would certainly be critical factors, yes, sir.
>
> * * * * * * *
>
> Q. And you considered that insurance policy an important part of your case, didn't you?

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5. The entire testimony of Petitioner's trial counsel given at the habeas corpus proceeding is attached to this Petition as Appendix D.

6. Affidavits are admissible as direct evidence in Georgia habeas corpus proceedings. Ga. Code Ann. §50-127(7)(c).

A. Certainly to show motive and scheme.

Q. You would have had a hard time showing motive without the insurance policy, don't you think?

A. I would have had difficulty without that, showing motive, yes, sir.

Q. So, Mr. Erson [Ursin] was a pretty key witness?

A. He was."

(R Habeas Corpus 72-73).

"State's witness, Roy Ursin, an employee of the Lincoln National Life Insurance Company, testified at trial that the insurance policy was in effect at the time of the murder. (T Trial 318-326). The insurance company later determined that the policy was not in effect at the time of the murder." (Finding of Fact, Habeas Corpus Court, Appendix B at p. 12). Mr. Ursin further testified that the premiums on the policy were paid by automatic bank check drawn on Petitioner's bank account, i.e., no independent action was required by Petitioner for the insurance company to monthly withdraw the premiums from his account. (T. Trial 318-326, R Habeas Corpus 448-456).

"Petitioner's trial counsel did not interview one of the key witnesses for the State, Roy Ursin, the secretary for Lincoln National Life Insurance Company." (Finding of Fact, State Habeas Corpus Court, Appendix B at p. 3). Because of his failure to interview Ursin, Petitioner's trial counsel was caught unprepared for the crucial testimony concerning the insurance policy:

"Q. [By Mr. Nursey]: You stated that you didn't interview Mr. Erson [Ursin] before he testified at the trial, is that correct?

A. [By Mr. Deal]: That's correct.

Q. The testimony that he gave took you by surprise, then, is that correct?

A. The part about how this insurance policy was paid for did, yes, sir."

(R Habeas Corpus 98, Appendix D at p. 21).

Had Petitioner's trial counsel prepared, evidence was readily available to show that the insurance policy was invalid on the date of Leonard Frazier's death and that Petitioner was aware of this fact. The State's key evidence of motive and sole evidence to prove the one aggravating circumstance found would have disappeared.

All of Petitioner's bank accounts were closed by November 24, 1975 (Petitioner's Habeas Corpus Exhibits No. 1 & 2, R Habeas Corpus 106-109); consequently, the premiums on the policy were not paid and, as was later acknowledged by the insurance company, the policy was invalid on the date of Frazier's death.

Petitioner was aware of this fact. The morning after his arrest (only one day after Frazier's death) at the first opportunity that he was afforded to speak with a member of his family, Ronald Douthit told his sister that his bank accounts were closed and asked her to verify this information. (R Habeas Corpus 22-23, 26-27)[7]. At his first meeting with his trial counsel, a few days later, Petitioner told counsel that the bank accounts had been closed. (R Habeas Corpus 91, Appendix D at p. 14).

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7. Petitioner was aware from police questioning that the police investigation focused on the life insurance policy (T Trial 335, R Habeas Corpus 465).

After being given this information, Petitioner's trial counsel did nothing to obtain the bank records to prove Petitioner's contentions:

> "Q. [By Mr. Nursey]: What month was the trial in 1976?
>
> A. [By Mr. Deal]: In January.
>
> Q. What part of January?
>
> A. The 27th and 28th.
>
> Q. So there was a little over a month between the first time you talked with Mr. Douthit and the trial, is that correct?
>
> A. That's correct.
>
> Q. And during that time you never got the records on his bank accounts?
>
> A. No, sir.
>
> Q. That is correct?
>
> A. That is correct. I did not get them."
>
> (R Habeas Corpus 91-92, Appendix D at pp. 14-15).

Incredibly even after Ursin's testimony, Petitioner's trial counsel failed to obtain the bank records:

> "Q. [By Mr. Nursey]: And if you had known before he [Ursin] was going to testify that he was going to testify to that [method of premium payment], what would you have done?
>
> A. [By Mr. Deal]: I would have had the bank records there.
>
> Q. And you would consider that properly representing Mr. Douthit, to bring in the bank records had you known Mr. Erson [Ursin] was going to say that?
>
> A. If I had known that's what he was going to testify to.
>
> Q. That would have been proper representation of Mr. Douthit to bring in those bank records?
>
> A. Sure it would.
>
> Q. Did you ask for a continuance after

Mr. Erson [Ursin] testified to prepare the bank records?

A. No sir, I didn't."

(R Habeas Corpus 98-99; Appendix D at pp. 21-22).

At Petitioner's trial, the State introduced evidence of statements allegedly made by Petitioner to police pursuant to his arrest at his residence; the State also introduced evidence, e.g., a pistol, seized as a result of statements allegedly made by Petitioner. (T Trial 306-310, 334-336, R Habeas Corpus 436-440, 464-466; State's Trial Exhibit No. 12, R Habeas Corpus 542).

At the habeas corpus proceeding, Petitioner presented the testimony of Charles Norman, a former prosecutor now in private practice in Marietta, Georgia (R Habeas Corpus 34). Charles Norman has never represented Ronald Douthit and has no interest in the outcome of this case (R Habeas Corpus 49). Norman testified concerning a conversation he had with Sgt. Doug Williams, the arresting officer in this case, and admissions made to him by Sgt. Williams.[8]

After Petitioner's trial, Sgt. Williams admitted to Charles Norman that during the questioning of Petitioner, and his co-indictee, Rodney Dulaney, police officers stripped bare an electric lamp cord, wrapped this cord around Rodney Dulaney, and threatened to plug the cord into a nearby electrical outlet

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8. Charles Norman appeared and testified voluntarily without subpoena; Sgt. Williams, a hostile witness, could not be subpoenaed to testify at the habeas corpus proceeding. Under Ga. Code Ann. §38-801(d), a witness must be tendered a witness fee of ten (10) dollars a day and mileage of twenty (20) cents per mile along with service of a subpoena. There is no exemption from this requirement for an indigent habeas corpus petitioner. E.g., Neal v. Smith, 226 Ga. 96, 172 S.E. 2d 684 (1970)

Petitioner moved the habeas corpus court for funds for witness and mileage fees; the motion was denied. Petitioner, therefore, could only call those witnesses who agreed to appear voluntarily, without subpoena. (R Habeas Corpus 2-3, 4, 37-38, 62-63).

if Dulaney did not talk. (R Habeas Corpus 48). This horrifying abuse took place in the presence of Petitioner and Petitioner agreed to talk only after witnessing the abuse (R Habeas Corpus 48).

Sgt. Williams made these admissions in a non-coercive atmosphere during lunch with Charles Norman (R Habeas Corpus 46-48). Sgt. Williams expressed a fear of testifying without immunity and was fearful of the police officers who would be implicated by his testimony. (R Habeas Corpus 50).

Petitioner's trial counsel filed no motions to suppress the statements of Petitioner or to suppress the fruits of the search of Petitioner's residence. In fact, trial counsel did not even request a Jackson v. Denno [378 U.S. 368(1964)] hearing prior to the introduction of the alleged statements at trial. (R Habeas Corpus 85; Appendix D at p. 8).

Incredibly, trial counsel decided not to file a motion to suppress without even seeing a copy of the search warrant (R Habeas Corpus 92; Appendix D at p. 15).

Trial counsel initially testified that he filed no motions to suppress because he felt that no damaging statements were made nor damaging evidence seized (R Habeas Corpus 85, 92; Appendix D at pp. 8, 15). Later, trial counsel admitted that such damaging statements and evidence were introduced by the State (R Habeas Corpus 93-94; Appendix D at pp. 16-17).

Trial counsel further testified that prior to trial, he was unaware of any physical abuse inflicted on Petitioner during police questioning (R Habeas Corpus 85-86; Appendix D at pp. 8-9). However, at Petitioner's preliminary hearing, one month prior to trial, trial counsel, in cross-examination

of Sgt. Williams, questioned Sgt. Williams concerning allegations of physical abuse of Petitioner (T Preliminary Hearing 52-53, R Habeas Corpus 930-931).

Petitioner's trial counsel presented absolutely no evidence on Petitioner's behalf during the penalty phase of the bifurcated capital trial. The only argument presented on Petitioner's "behalf" at the penalty phase was as follows:

> "MR DEAL: May it please the Court, ladies and gentlemen:
>
> You heard what Mr. Darden said about--you heard this police officer say that he had never--didn't know anything about any record this boy had. You must believe these people, with all the contradictions and all the testimony where they have admitted they lied, and if you convict a man with that, I am not going to stand up here, like Mr. Darden said, and beg for mercy. I am going to ask you to go out there and bring back a verdict for whatever your conscience will let you live with, and I thank you."
>
> (T Trial 385, R Habeas Corpus 515).

This one paragraph closing argument was given by trial counsel within minutes of the guilty verdict while counsel was emotionally upset and angry with the jury:

> "Q. [By Ms. Westmoreland]: Did you present any argument at the sentencing phase of the trial after the conviction?
>
> A. [By Mr. Deal]: My total argument at that time was that I had gotten a little upset with the jury coming back, and I told them -- my only argument was that they bring back whatever verdict they thought they could live with. Mr. Darden in his argument had argued to the jury that 'they're going to get up here and they're going to beg for mercy and they're going to do this and that and the other", and I said, 'No we won't beg for mercy. You just bring whatever verdict you think your conscience will allow you to live with'".
>
> (R Habeas Corpus 84; Appendix D at p. 7).

* * * * * * *

"Q. [By Mr. Nursey]: You said that the only argument you presented to the jury during the penalty phase was 'do what your conscience tells you is right.' Am I more or less paraphrasing correctly?"

A. [By Mr. Deal]: I just told them to bring back whatever verdict that their conscience would allow them to live with.

Q. And you said at that time you were pretty upset with the jury after returning the guilty verdict?

A. Right.

Q. Did you request any kind of continuance to prepare evidence for the penalty phase?

A. No, sir.

Q. Did you request any kind of recess or continuance for your emotions to cool down for a little while?

A. No, sir.

(R Habeas Corpus 98; Appendix D at p. 21

Petitioner's trial counsel made absolutely no preparation for the penalty phase of trial:

"Q. [By Mr. Nursey]: Mr. Deal, what evidence did you prepare for the penalty phase of this trial?

A. [By Mr. Deal]: I don't guess we prepared any because I didn't really think we were going to get that far, Mr. Nursey.

Q. You didn't think there would ever be a penalty phase?

A. No sir."

(R Habeas Corpus 96-97; Appendix D at pp. 19-20).

At the state Habeas Corpus proceeding, Petitioner presented the testimony of his grandmother and sister and the affidavits of seven (7) reputable members of the community who have known Petitioner all of his life to show that evidence of mitigation was available and could have been

presented at the penalty phase of trial (Petitioner's Habeas Corpus exhibits No. 3-10; R Habeas Corpus 110-129). Petitioner further presented testimony to show the ease with which the affiants were located and interviewed (R Habeas Corpus 31-33).

Among the evidence of mitigation demonstrated was the following: Petitioner, Ronald Douthit, was orphaned at a young age and was raised by his grandmother; that Ronald Douthit had never previously been arrested or in trouble with the law; that Ronald Douthit maintained gainful employment and supported his grandmother; that Ronald Douthit regularly attended and was active in the Baptist Church and drove his grandmother to Church every Sunday; that Ronald Douthit had a reputation for helping persons in his community, that he provided transportation to the grocery store and other places for elderly persons in his neighborhood; that Ronald Douthit loved to work with children and that he used to organize ballgames and other activities for the children in his neighborhood. (R Habeas Corpus 25-27, 29-30; Petitioner's Habeas Corpus Exhibits No. 3-10, R Habeas Corpus 110-129). None of the affiants were ever contacted by Petitioner's trial counsel (R Habeas Coprus 110, 113, 115, 117, 119, 122, 125, 129).

The State offered no evidence at the habeas corpus proceeding to attempt to rebut this evidence of mitigation.

REASONS FOR GRANTING THE WRIT

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, PRE-TRIAL, IN THE GUILT/INNOCENCE PHASE OF TRIAL, AND AT THE SENTENCING PHASE OF TRIAL IN A CAPITAL CASE WHERE THE SENTENCE OF DEATH WAS IMPOSED IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Pre-Trial

The pre-trial phase of a criminal defense is "perhaps the most critical period of the proceeding," a time when "consultation, thorough-going investigation and preparation are vitally important." Powell v. Alabama, 287 U.S. 45, 57 (1932); accord, e.g., Von Moltke v. Gillies, 332 U.S. 708 (1948).

Section 4.1 of the American Bar Association Standards Relating to the Prosecution Function and the Defense Function states:

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities..."

In this "most critical" phase, Petitioner's trial counsel's failings were numerous.

Trial counsel failed, pre-trial, to investigate the State's "insurance motive" theory. Had trial counsel conducted this investigation, his investigation would have revealed that the insurance policy was paid by automatic bank checks from Petitioner's bank account. This investigation would

have further revealed that the policy was invalid since Petitioner had closed his bank accounts. (See pp. 5, 10-12, supra).

Counsel was certainly on notice of these facts since he was informed of them by Petitiner at counsel's first meeting with Petitioner (R Habeas Corpus 91, Appendix D at p. 14). Had this adequate investigation been conducted, trial counsel could have refuted the State's theory of motive and eliminated the proof of the sole aggravating circumstance supporting the death sentence (See, pp. 9-10, supra).

Trial counsel failed to interview Roy Ursin, the State's key witness (R Habeas Corpus 72-73; 98, Appendix D at p. 21); thus, counsel was caught by surprise and was unprepared to rebut this crucial testimony which, subsequent to the trial, was determined to be erroneous.

Trial counsel failed to make any motion to suppress Petitioner's statements or evidence seized from Petitioner's residence despte the suspect circumstances of the arrest, interrogation and search and seizure (See, pp. 6-7, 8, 13-14, supra). Incredibly, trial counsel made his determination to file no motion to suppress evidence even though he had never even seen a copy of the search warrant upon which the search was based (R Habeas Corpus 92; Appendix D at p. 15). Counsel's sole justification for failing to file motions to suppress was that he felt that no damaging statements were obtained or damaging evidence seized; however, he later

admitted that such damaging statements and evidence were obtained (See, p. 14 supra).

Trial counsel failed to "explore all avenues leading to facts relevant to . . .penalty" (§4.1 ABA Standards). In fact, trial counsel failed to explore any avenues. For the critical sentencing determination, Mempha v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967), trial counsel made no pre-trial preparation (R Habeas Corpus 97-98; Appendix D at pp. 20-21).

B. Trial

Trial counsel virtually defaulted the trial stage of Petitioner's case. From the beginning of the voir dire examination of the jury, trial counsel exhibited no more than a pro forma approach to the conduct of the trial.

The entire voir dire and jury selection process required only 57 pages of transcript (T Trial 1-57; R Habeas Corpus 133-188). Trial counsel asked only three or four general closed-ended questions of the prospective jurors.

Typical of a voir dire examination of a prospective juror was as follows:

> "Q. [By Mr. Deal]: Mr Garcia, have you or any member of your immediate family ever been the victim of a crime?
>
> A. [By Juror]: No, sir.
>
> Q. Do you know of any reason why you could not be competently [sic] impartial, should you be chosen as a juror in this case?
>
> A. No.
>
> Q. Would the fact my client is a black man have any bearing in your decision in this case?
>
> A. No.
>
> MR. DEAL: Nothing further."
>
> (T. Trial 12; R Habeas Corpus 144).

The purpose of voir dire is " . . . to determine whether the veniremen are qualified, whether they have prejudged the case, and whether their minds are free from prejudice or bias . . ." Kruether v. United States, 376 F. 2d 654, 656-657 (10th Cir. 1967). It is considered to be an ". . .integral, vital element of a fair trial." United States v. Woods, 364 F. 2d 481, 483 (3d Cir. 1966).

Counsel's "perfunctory approach to the important task of selecting an unbiased jury", Marzullo v. Maryland, 561 F. 2d 540, 547 (4th Cir. 1977), fell short of even the most minimal standard.

If trial counsel's approach to selection of the jury was merely pro forma, it was probably the high point of his performance at trial.

Trial counsel waived his right to make an opening statement on Petitioner's behalf (T Trial 60-61; R Habeas Corpus 191-192). Trial counsel presented no evidence on Petitioner's behalf although there was favorable evidence available, e.g., evidence that the life insurance policy was invalid on the date of the victim's death and that Petitioner was aware of this (See, pp. 11-12, supra).

Even after trial counsel was surprised by the testimony of Roy Ursin concerning the insurance policy (R Habeas Corpus 98, Appendix D at p. 21), counsel failed to obtain the bank records necessary to rebut the testimony (R Habeas Corpus 98-99, Appendix D at pp. 21-22). Later,

trial counsel admitted that proper representation of Petitioner required that he obtain the bank records (R Habeas Corpus 98-99, Appendix D at pp. 21-22). Tragically, Mr. Ursin's testimony concerning the validity of the policy, was later determined to be incorrect.

Although Petitioner literally begged trial counsel to allow him to testify in his own behalf, trial counsel refused (R Habeas Corpus 95-96, Appendix D at pp. 18-19).

Not one word of testimony was spoken nor one document introduced to rebut any of the State's case.

Trial counsel possesses a sincere belief in Petitioner's innocence (R Habeas Corpus 83; Appendix D at p. 6). However, his only effort at trial was to sit on this sincere belief and do nothing to actually represent Petitioner.

C. Penalty Stage

The quality of the representation afforded during the penalty phase of Petitioner's trial must be considered in light of this Court's holding "that in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence." Gregg v. Georgia, 428 U.S. 153, 189 n. 38 (1976)(emphasis supplied).

This Court explained mimimum requirements for the fair determination of sentence in Woodson v. North Carolina, 428 U.S. 280, 304 (1976):

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> While the practice of individualizing sentencing determination generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendent [cite omitted] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of infliction the penalty of death."

See also, Lockett v. Ohio, 438 U.S. 586 (1978). The primary responsibility for insuring that these mitigating considerations are presented to the sentencing authority falls squarely upon defense counsel.

Even in misdemeanor cases, at sentencing, it is common for defendant's counsel to present to the court information concerning the defendant's background and character. This is so much more necessary in a capital case where life itself is at stake.

The ABA Standards on the Administration of Criminal Justice, Sentencing Alternatives and Procedures define the responsibilities of defense counsel in the sentencing procedure as follows:

Section 5.3 Duties of Counsel

> (e) The defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important services of the entire proceeding can be performed.
> (f) The duties of the defense attorney with respect to each specific sentence should include the following steps: . . .
>
> (iii) The attorney should satisfy himself that the factual basis for the sentence will be both adequate and accurate, and that the record of the sentencing proceeding will accurately reflect relevant circumstances of the offense and characteristics of the defendant which were not disclosed during the guilt phase of the case . . .

Trial counsel for Petitioner testified that he did absolutely no preparation for the penalty stage (R Habeas Corpus 96-97, Appendix D at pp. 19-20). He did no investigation of Petitioner's background, he interviewed not one witness to present testimony in mitigation.

Trial counsel testified that his only attempt to place any mitigation in the record was his cross-examination of a police officer where the officer testified that he knew of no arrest record on Petitioner (R Habeas Corpus 84, 97; Appendix D at pp. 7, 20). However, trial counsel's recollection of the police officer's testimony is incorrect:

> "Q. [By Mr. Deal]: I believe you also stated that you had known Mr. Douthit here for about three years?
>
> A. [By Lt. Moss]: Yes sir, that's correct. Maybe a little bit longer.
>
> Q. Do you know whether or not, during the course of your examination or prior thereto when you first met him, from there on up until now, have you investigated as to whether or not he has any type of record?

A. No, sir; I have never checked any record on him.

Q. Do you know of him ever being arrested before for anything?

A. No, sir; I do not know it.

Q. You have been employed here with the County Police Force for all this period of time that you have known him, have you not?

A. Yes, sir, I have.

Q. If he had had one would you have known about it?

THE COURT: Mr. Deal, there are certain statutory questions that you are confined to.

MR. DEAL: I am through with this witness."

(T Trial 314, R Habeas Corpus 444).

The state habeas corpus court found as follows:

"Petitioner complains that his trial counsel did not prepare for and did not render reasonably effective assistance during the sentencing phase of the trial. It is true that trial counsel offered no evidence and that his argument was extremely abbreviated. He was surprised by the guilty verdict and somewhat overcome. His reaction to a situation he had not anticipated was to do nothing, or at least very little."

Conclusions of Law, State Habeas Corpus Court, Appendix B at p. 6. (emphasis supplied)

Although prejudice need not be shown, for when an attorney does nothing "the degree of prejudice can never be known" Hamilton v. Alabama, 368 U.S. 52, 55 (1961), substantial prejudice can be shown in this case. At the state habeas corpus proceeding, Petitioner made a showing of substantial evidence of mitigation which easily could have been presented at the penalty stage (see, pp. 16-17, supra).

There are several indications in the record that the jury's decision on life and death was close: 1) the District Attorney testified that he was surprised that the jury imposed the death sentence in this case (R Habeas Corpus 72); 2) during it deliberations, the jury returned to question the court concerning the procedure for granting "mercy" (T Trial 389, R Habeas Corpus 519); 3) the jury was divided on the issue of punishment for an extended period of time (T Trial 390, R Habeas Corpus 520); 4) the jury rejected two of the three aggravating circumstances urged by the State (T Trial 392-393; R Habeas Corpus 522-523).

The slightest bit of evidence may very well have tipped the scales in favor of life. In this case, there wasn't even a grandmother's tear in evidence asking that Ronald Douthit's life be spared.

CONCLUSION

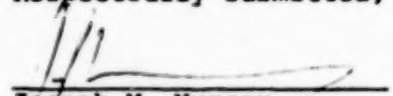
In 1932, this Court in Powell v. Alabama, supra, held that a person on trial for his life, at a minimum, has the right to be represented by counsel. In this Petition, this Court is confronted with a situation where at a critical stage of the proceedings, a stage where Petitioner's very life was at stake, his trial counsel did nothing.

Trial counsel testified that he did nothing; the Georgia state courts have found that he did nothing.

Before Ronald Douthit is sent to his death, shouldn't he have a trial where he is represented by an attorney? In 1981, forty-nine years after Powell, the state courts of Georgia have answered this question, "No".

WHEREFORE, for the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of Butts County, Georgia.

Respectfully submitted,



Joseph M. Nursey
Pamela L. J. Arangno
Millard C. Farmer
Andrea I. Young

ATTORNEYS FOR PETITIONER

15 Peachtree St., N.E.
Suite 831
Atlanta, Georgia 30303

(404) 688-8116

CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party, Ms. Mary Beth Westmoreland, Assistant Attorney General, 132 State Judicial Bldg., 40 Capitol Square, Atlanta, Georgia 30334; with a copy of the foregoing Petition for Writ of Certiorari and the Appendix thereto by placing same in the United States Mail with adequate first-class postage attached.

This 8th day of July, 1981.

Joseph M. Nursey
Attorney for Petitioner

15 Peachtree St., N.E.
Suite 831
Atlanta, Georgia 30303

(404) 688-8116

July 8, 1981

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 81 5026

RONALD DOUTHIT,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

Application No. 1476

SUPREME COURT OF GEORGIA

ATLANTA, April 13, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

RONALD DOUTHIT V. WALTER B. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, P.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

Appendix A

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

RONALD DOUTHIT,	:	
	:	
PETITIONER	:	
	:	CASE NO. 4663
VS.	:	
	:	HABEAS CORPUS
WALTER ZANT,	:	
SUPERINTENDENT	:	
GEORGIA DIAGNOSTIC	:	
AND CLASSIFICATION	:	
CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This Habeas Corpus Petition challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Cobb County, Georgia. He was convicted of Murder and sentenced to death by electrocution. His conviction and sentence were affirmed by the Supreme Court of Georgia. Douthit v. State, 239 Ga. 81 (1977). Certiorari was denied by the United States Supreme Court. Petitioner's extraordinary motion for new trial was denied by the Cobb Superior Court and this denial was affirmed by the Supreme Court of Georgia. Douthit v. State, 244 Ga. 471 (1979).

Although this Petition asserts Seventeen Counts, evidence and argument were presented on only eight distinct points. The Court will address these issues, deeming the other unsupported contentions of the Petition to be waived and without merit.

The record in this habeas consists of the record and transcript of Petitioner's trial; the record and transcript of Rodney Dulaney's trial (a co-indictee); the record and transcript of Petitioner's extraordinary motion for new trial; the record and transcript of this habeas proceeding.

1.

The Petitioner contends that he was denied the effective assistance of counsel at both the guilt/innocence and penalty phases of the trial because his trial counsel: (1) failed to challenge the composition of either the grand or traverse juries; (2) failed to investigate the search and seizure of his kennel; (3) failed to interview a key state's witness; (4) failed to obtain or introduce evidence of Petitioner's bank accounts to show that the policy was not in effect; (5) failed to prepare for the penalty phase; (6) failed to put forth any evidence or witnesses at the guilt/innocence or penalty phases of the trial.

FINDINGS OF FACT

Petitioner's trial counsel was Eugene Deal who was retained by Petitioner's relatives.

No motion was made at the trial stage challenging the array of the Cobb County Grand and Traverse Juries. No evidence was presented during this habeas proceeding or at the trial level indicating any disparity between the Grand and Traverse Juries and the general population of Cobb County.

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Petitioner's trial counsel did not make a motion to suppress evidence obtained as a result of the search of Petitioner's kennel by the Cobb County Police. Petitioner's trial counsel never requested and never saw the search warrant used to obtain this evidence.

Petitioner's trial counsel did not interview one of the key witnesses for the State, Roy Ursin, the secretary for Lincoln National Life Insurance Company. Petitioner's trial counsel also failed to obtain or introduce the bank records of the Petitioner to show the insurance policy was not in effect at the time of the murder.

Petitioner's trial counsel's only argument during the penalty phase of the trial was a short statement. (See T.T., p. 385). Petitioner's trial counsel did not put forth any evidence or witnesses on behalf of the Defendant during the guilt/innocence stage. (T.T. p. 340).

CONCLUSIONS OF LAW

The above allegations by Petitioner that his trial counsel was ineffective must be considered in light of the entire trial and the circumstances surrounding the trial. The standard of review for alleged inadequacies of trial counsel was established in a decision by the Fifth Circuit Court of Appeals. MacKenna v. Ellis, 280 F.2d. 529, 599 (5th Cir. 1960). Under MacKenna, effective assistance of counsel is "not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably

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likely to render and rendering reasonably effective assistance." The Georgia Supreme Court has adopted this standard. See Pitts v. Glass, 231 Ga. 638 (1974). It is under this standard that the alleged errors of trial counsel must be reviewed in order to determine whether the Petitioner was denied his Sixth Amendment right to counsel.

Under Ga. Code §50-127(1), the right to object to the composition of the grand or traverse jury will be deemed waived on habeas corpus unless the Court is satisfied that cause exists for allowing the Petitioner to pursue the objection. No such cause has been shown in this case.

The failure of trial counsel to challenge the grand and traverse juries of Cobb County does not demonstrate a failure to render reasonably effective assistance. The Cobb grand and traverse juries had recently been upheld prior to Petitioner's trial (Habeas Transcript 82); therefore, any challenge would probably have been unsuccessful. Therefore, Petitioner cannot use alleged ineffective assistance to satisfy the "cause" requirement of Code §50-127(1).

The failure of trial counsel to investigate the circumstances surrounding the search and seizure of items involved in the crime is alleged as another example of the ineffectiveness of trial counsel. No search warrant was produced at trial. However, this Court cannot presume that the missing search warrant was invalid. Indeed, the presumption is that the search was carried out in a lawful

manner unless rebutted. No such evidence has been produced. Additionally, the record indicates that Petitioner consented to and even assisted the police in their search. (T.T. 331, 332).

With these conclusions in mind, the failure of the trial counsel to file a motion to suppress cannot be deemed ineffective assistance of counsel.

Trial counsel's failure to interview one of the State's key witnesses, the insurance executive from Lincoln National, cannot be said to have constituted ineffective assistance. The gain that would have been derived from a pre-trial interview of this witness would not have substantially affected the outcome of the trial.

The Petitioner also contends that the failure of his trial counsel to produce his bank accounts to refute the insurance witness's testimony that the policy was in effect constituted ineffective assistance. However, even assuming trial counsel had produced evidence showing that the policy was not in effect at the time of the murder, the jury would still have been authorized to find that the Petitioner was not aware of this fact. Whether or not the policy was actually in effect is not as important as whether the Petitioner believed it was in effect. A rational trier of fact would be authorized to infer that the Petitioner believed he would recover the insurance proceeds. Accordingly, the failure of trial counsel to find and present this evidence cannot be said to have made any

difference in the outcome of the trial. Further, Petitioner has not demonstrated that his counsel could likely have discovered what the witness and the District Attorney did not - that the policy was not in effect at the time of the murder.

Petitioner complains that his trial counsel did not prepare for and did not render reasonably effective assistance during the sentencing phase of the trial. It is true that trial counsel offered no evidence and that his argument was extremely abbreviated. He was surprised by the guilty verdict and somewhat overcome. (H.T. p. 98). His reaction to a situation he had not anticipated was to do nothing, or at least very little.

Hindsight understandably leads Petitioner to the view that his counsel did very little if anything for him on the issue of sentence. But the constitutional issue is more difficult, because the requirement of the Sixth Amendment is that counsel be reasonably effective - not that he be excellent, errorless, or even the best available.

Without intending any disrespect to Petitioner's counsel, there are lawyers who might have done a better job. While we wish the ideal of justice were available equally to rich, poor, and middle class, it is not. While Petitioner's family was able to hire counsel for

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him, the service he got was not of the highest possible quality.

But was it so bad that he was denied his Sixth Amendment right to counsel?

The Court must conclude not. The sad truth is that the most talented members of the legal community do not handle death penalty cases. While there are exceptions, most occupants of death row had less than imaginative representation. They could not afford it and the State did not provide it.

Measuring Petitioner's representation against the standard for handling death cases in Georgia, of which this Court has seen many, the Court cannot conclude that Petitioner's representation was so ineffective that his constitutional rights were denied. Most counsel in these cases do not offer evidence during the sentencing phase. The Court cannot say it is likely that the evidence proffered at the habeas hearing would have made any difference in the jury's sentence. (See H.T. pp. 93-95, p. 98). Neither can the Court say that a more lengthy argument by counsel on the issue of punishment would have been likely to produce a different result.

To show that counsel was not reasonably effective in a constitutional sense, Petitioner would have to point not only to questionable judgment or omissions by counsel but would have to show how different or more affirmative actions would have been

reasonably likely to affect the outcome of the trial. Petitioner in this case has been unable to do that.

The ineffective assistance claim is found to be without merit.

2.

Petitioner contends that his death sentence is arbitrary, capricious and disproportionate because Petitioner received the death sentence while his co-defendant, the actual "triggerman" who committed the murder received a sentence of life imprisonment at a subsequent trial.

FINDINGS OF FACT

The evidence at trial did not place Petitioner at the scene of the crime. (T.T. pp. 334-335). The Petitioner was tried on the theory of conspiracy, and the State contended that either or both of the co-defendants actually committed the murder.

The testimony at trial indicated that the Petitioner had knowledge of the location of the weapon after he was arrested. In fact, the Petitioner showed the investigators where the gun was located. (T.T. p. 331).

Petitioner took out an insurance policy on the victim Leonard Frazier on September 28, 1975. (T.T. p. 215-217). A change of beneficiaries occurred on December 10, 1975, one week before the murder. Petitioner was listed as the beneficiary. (T.T. 219-220). Petitioner called one of the insurance company's representatives to confirm

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that the change in beneficiaries had been effected. (T.T. 230).

The insurance policy was found in the trunk of Petitioner's car.

CONCLUSIONS OF LAW

Initially, the Court notes that the Georgia Supreme Court has indirectly considered and ruled against the Petitioner on this contention. Douthit v. State, 239 Ga. 84, 90 (1977). In determining that the death sentence was not disproportionate, the Georgia Supreme Court considered similar cases. However, it is not clear whether the Court considered the circumstance of Petitioner's co-indictee being sentenced to life imprisonment when there was evidence that Dulaney was the triggerman.

Thus, the Court will consider this contention on its merits.

Petitioner contends that the holding in Hall v. State, 241 Ga. 252, 260 (1978) requires that Petitioner's death sentence be vacated on the ground that it is disproportionate to the life sentence imposed on his co-indictee who was also found guilty of murder. Petitioner asserts that the evidence showed that he was not the triggerman and that Dulaney, his co-indictee, committed the act of murder. However, the Court in Hall distinguished a previous decision in which they found that the sentence of death was not disproportionate where the defendant, although not the triggerman, was in fact the "prime mover" or "mastermind" in the crime. See Hill v. State, 237 Ga. 794 (1976).

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The evidence in this case as presented at trial and throughout the appellate proceedings is inconclusive as to who committed the act of murder. However, although Petitioner and his co-indictee were both convicted of the murder of Leonard Frazier, only the Petitioner was found to have committed the murder in order to get the proceeds of the life insurance policy taken out on the victim's life. There was sufficient evidence to authorize a jury's determination that Petitioner had committed the murder for himself or another for the purpose of receiving money or any other thing of monetary value. Ga. Code Ann. §27-2534.1(b)(4). This aggravating circumstance permitted the jury to recommend the death penalty. In the subsequent trial of Rodney Dulaney, the State's case was one of murder apparently without any additional statutory aggravating circumstances. The actions of these two co-indictees, although in concert, were intrinsically distinguishable. The nexus between the acts committed by Dulaney and those committed by the Petitioner is not sufficiently close to fall into the rationale of the Hall decision, supra.

Furthermore, the evidence demonstrates that Petitioner was, in fact, the "prime-mover" or mastermind of this plan. He procured the policy on Frazier, paid the premiums and knew of the change of beneficiary. The jury was authorized to find that the statutory aggravating circumstance existed. The death sentence imposed on Petitioner

is not excessive or disproportionate even in light of the lesser sentence given his co-indictee. See Gregg v. Georgia, 428 U.S. 133, 188 (1976).

This ground is without merit.

3.

Petitioner contends that the statements introduced against him were improperly obtained and that the statements and evidence obtained as a result of the statements were inadmissible.

The Georgia Supreme Court considered this issue in its review of the denial of Petitioner's extraordinary motion for new trial. That denial was affirmed by the Court. Douthit v. State, 244 Ga. 471 (1977).

Accordingly, this issue cannot properly be raised at the State habeas level because the Georgia Supreme Court has already considered the contention and ruled adversely to Petitioner's position. Goodwin v. State, 240 Ga. 605 (1978).

4.

Petitioner contends that the evidence seized from his residence was inadmissible because the search and seizure violated Defendant's Fourth and Fourteenth Amendment Rights.

FINDINGS OF FACT

The search of Petitioner's residence was conducted pursuant to a search warrant. No motion to suppress was filed on Petitoner's behalf. The evidence was admitted without objection.

Petitioner's trial counsel was not ineffective in failing to file the motion to suppress. (See Conclusions of Law, Part 1).

CONCLUSIONS OF LAW

Because Petitioner has not shown any cause or prejudice, he cannot raise this issue in this State habeas proceeding. Francis v. Henderson, 425 U.S. 536, 48 L.Ed.2d. 149, 96 S.Ct. 1708 (1976). Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d. 594, 97 S.Ct. 2497 (1977).

This contention is without merit.

5.

Petitioner contends that his conviction and sentence to death were based on false testimony.

FINDINGS OF FACT

State's witness, Roy Ursin, an employee of the Lincoln National Life Insurance Company, testified at trial that the insurance policy was in effect at the time of the murder. (T.T. 318-326). The insurance company later determined that the policy was not in effect at the time of the murder.

CONCLUSIONS OF LAW

As indicated previously, whether the policy was actually in effect at the time of the murder is not essential to the finding of intent by the jury. The evidence presented to the jury notwithstanding Mr. Ursin's testimony was sufficient to authorize the jury's finding of both the intent required to convict

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for murder and also the (b)(4) aggravating circumstance.

This contention is without merit.

6.

Petitioner contends that the trial judge's charge on presumption was defective under Sandstrom v. Montana, 442 U.S. 510 (1979).

FINDINGS OF FACT

The entire charge during the guilt/innocence phase of the trial. (T.T. 365-379).

CONCLUSIONS OF LAW

Judge Hames charged the jury properly regarding the presumption of a person intending the natural consequences of his acts. Judge Hames prefaced his charge by stating that the presumptions to be given were rebuttable. (T.T. 372).

It has been held that there is no Sandstrom problem where the presumption charge is prefaced with the instruction that these presumptions are rebuttable, and no burden-shifting charge results. See Sandstrom, supra, at p. 519. Skrine v. State, 244 Ga. 520 (1979).

This contention is without merit.

7.

Petitioner contends that he was denied his right to confront witnesses against him by the admission of a prejudicial hearsay statement by his co-defendant.

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FINDINGS OF FACT

The State introduced the testimony of Officer Morris Toler concerning the interrogation of Petitioner and his co-indictee, Rodney Dulaney. (T.T. 291). However, no statement of Dulaney was testified to except for the observation that he gave an alibi inconsistent with that of Douthit. The substance of any such statements by Douthit was never gone into at trial.

There was no objection to this testimony by Petitioner's trial counsel. (T.T. 291).

CONCLUSIONS OF LAW

This contention is factually without merit. Accordingly, no basis for relief is shown.

8.

The Petitioner contends that the instructions at the penalty stage were not sufficiently clear so as to inform the jury of their option of recommending the sentence of death or if they found mitigating circumstances they could recommend a life sentence even if aggravating circumstances were found.

FINDINGS OF FACT

The entire charge of the trial court at the penalty phase is the Court's sole finding on this issue. (See T.T. 385-388).

CONCLUSIONS OF LAW

The trial court's charge at the penalty phase of this trial is a model of clarity and precision. The jury was well instructed on their option of recommending either life or death for the Petitioner. The charge is in compliance with the requirements set forth by the Georgia Supreme Court. Spivey v. State, 241 Ga. 477, 481 (1978).

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This contention is without merit.

The last three contentions of Petitioner are unsupported by authority; however, the Court has nevertheless considered them but finds them to be completely without merit.

JUDGMENT

After careful consideration and deliberation of all the contentions asserted by Petitioner, this Court finds no substantial denial of any of Petitioner's constitutional rights under either United States or Georgia Constitutions. The writ of habeas corpus is hereby denied.

So Ordered, this 14th day of November, 1980.

R. ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

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GEORGIA CODE PROVISIONS

Georgia Code Annotated Section 24-4526

Appeals of Habeas Corpus After Criminal Convictions

When Applications Granted An application to appeal a final judgment in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated Section 26-1101

Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Georgia Code Annotated Section 38-801(d)

(d) Fees; mileage.--The witness fee shall be $10 per diem, and execution shall be issued by the clerk upon affidavit of the witness to enforce payment thereof. The payment of fees shall not be demanded as a condition precedent to attendance, but when a witness resides outside the county where the testimony is to be given, service of the subpoena to be valid must be accompanied by tender of the fee for one day's attendance plus mileage of 20 cents per mile for traveling expenses for going from and returning to his place of residence by the nearest practical route. Tender of fees and mileage may be made by United States currency or postal money order, or by cashier's or certified check. When the subpoena is issued on behalf of the state, or an officer, agency or political subdivision thereof, or a defendant in a criminal case, fees and mileage need not be tendered.

Georgia Code Annotated Section 50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whoses liberty is being restrained by virtue of a sentence imposed against them by a State court of record

Notwithstanding the other provisions of the Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

APPENDIX C

P. 1

(1) Grounds for writ.--
Any person imprisoned by virtue of a sentence imposed by any State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional or abandonment of a known right or privilege which relenquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence showa in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.--
The petition shall identify the proceeding in which the petitionor was convicted, give the date of rendition of the final judgment complained of, and clearlyset forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person on his behalf.

(3) Jurisdiction and venue.--
The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiaction of habeas corpus actions arising under this section.

(4) Service of the petition.--
Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of thepetition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other quthority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.--
Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.--
Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

App. C, p. 2

(7) Disposition in the trial court.--

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 and 81A-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.--

All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.--

After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fac t and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of alw shall be recorded as part of the record of the case.

(10) Subsequent petitions--waiver of grounds not claimed.--

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be riased by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.--

(a) Appeals in habeas corpus cases shall be governed by the Appellante Procedure Act of 1965 [§6-701 et seq], except that as to final orders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant or deny the application within

a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of the proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this chapter was originally imposed.

Georgia Code Annotated Section 27-2534.1(b)(4)

(b)(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

have any reason to believe at that time, still don't for that matter.

BY MS. WESTMORELAND: That's all the questions I have.

BY THE COURT: You may step down.

(WHEREUPON, Court recessed for the noon hour, and after lunch the following transpired:)

EUGENE DEAL, first having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. WESTMORELAND:

Q Would you state your name for the record, please?

A Eugene A. Deal.

Q Mr. Deal, what is your occupation, please, sir?

A I'm an attorney.

Q How long have you been an attorney at law?

A I was admitted June 11, 1965.

Q And out of that time have you practiced in a number of criminal cases?

A Yes, ma'am.

Q Could you give me an estimate as to what percentage of your case load has been criminal work?

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A I would say at least half of my practice.

Q In 1975 and 1976 did you represent the Petitioner, Ronald Douthit, on charges in Cobb County?

A I did.

Q What were those charges, please, sir?

A He was charged with murder.

Q Were you appointed or retained to represent Mr. Douthit?

A I was retained for the trial phase, to represent him during the trial.

Q What were the circumstances of your retention?

BY THE COURT: What do you mean?

BY MS. WESTMORELAND:

Q Who retained you?

A Oh, well I was first contacted by Mrs. Mary Foreman and her husband, Mr. Douthit's sister and brother-in-law.

Q Did she pay you?

A I believe that between her and Mrs. Douthit, Ronald's grandmother, they were the two people that were responsible for my fee.

Q Do you recall approximately at what time this was, what stage the proceedings were in when you were retained?

A I believe it was sometime before Christmas. It was after the 17th when Mr. Douthit was arrested, but between then and Christmas, and I don't know the exact date, of 1975.

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Q Do you recall if it was prior to arraignment or specifically any of those details?

A It was prior to arraignment. It was prior to indictment I think.

Q Could you explain to the Court what your investigation of the case involved? What did you do in preparing for trial?

A Well, I talked with Mr. and Mrs. Foreman, talked with Mrs. Douthit, Ronald's grandmother; I went to the jail on several occasions and talked to Ronald; I spoke with all the witnesses that testified at the trial with the exception of Mr. Roy Erson, the insurance man who came down from Ohio, prior to trial.

Q Did you have an opportunity to talk with Mr. Erson before he testified?

A He was put on the stand and I believe at that time I -- Mr. Darden, the district attorney, and myself approached the bench and discussed my talking with him, having an opportunity to talk with Mr. Erson. Mr. Darden told me that he was only going to testify that there was an insurance policy. We had practically stipulated that fact. I did not make an issue about talking with him at point.

Q Did you file any pretrial motions in this particular case?

A Yes, ma'am. I filed two.

Q What were those motions?

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A I filed a motion to sever, which was granted, and I filed a discovery motion.

Q That was a motion to sever Mr. Douthit and Mr. Delaney's trials?

A That's correct.

Q What was your other motion?

A The other motion was a discovery motion. And at that time when we argued the discovery motion Mr. Darden and myself got into quite an argument there and finally he just said, "I'll just let you copy the file." We went from the courtroom down to the Clerk's office -- went to his office and he got one of the girls there, gave her the file, and she went from there to the Clerk's office and she copied it. I got the copy.

Q So you had access to everything in his file, is that correct?

A Everything that was in the file that he had in the courtroom, I did, yes, ma'am, but I did not get a copy of the search warrant. I tried to get that and I never got that.

Q On how many occasions would you give an estimate that you would say you talked with Mr. Douthit prior to trial?

A I don't really know. I would say four or five at least, but I don't know exactly.

Q Did you discuss the case with him?

A That's right.

Q And did you discuss the possible consequences or the outcome of the case?

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A Well, we discussed everything Mr. Douthit supposedly knew about the case. We also went through a commitment hearing prior to indictment, because at that time there were three men charged and it later developed after that commitment hearing one of them was released from jail.

Q Did you ever challenge the grand or traverse jury pools?

A No, I didn't.

Q Why didn't you?

A Well, I didn't really think it was necessary. I believe that there have been challenges to the grand and petit jury pools in Cobb County and they have been held to be constitutional. That was just a judgment call.

Q Did you conduct a voir dire at trial examining the jurors, potential jurors?

A Yes, ma'am.

Q Did you satisfy yourself that you had an impartial jury, as nearly as possible?

A As far as I could see I thought they were.

Q Did you make an opening statement at trial?

A No, I didn't. I asked the trial judge to allow me to make my opening statement at the close of the State's evidence. He would not do that. He said, no, that I either make it then or not at all, so I didn't make an opening statement.

Q Was that just a tactical decision?

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A Yes, ma'am.

Q What did you advise Mr. Douthit in regard to his testifying at trial?

A Mr. Douthit wanted to testify and at that time, since Mr. Darden, the district attorney, was trying the case and was a very experienced trial lawyer -- in fact there was a lot of talk then that he was probably the third most experienced trial lawyer in Cobb County behind Judge Luther Haynes and the former district attorney, Ben Smith. I didn't feel that Mr. Douthit would be able to withstand Mr. Darden's cross examinations, and I did not -- myself, along with Mrs. Foreman, his sister, talked him out of going on the stand. Now, he wanted to, he wanted to testify.

Q But you advised him not to?

A I did, yes, ma'am.

Q How did you feel in regard to the possibility of a conviction in this case? What was your impression as an attorney?

A I didn't really think that they would convict Mr. Douthit because I never believe that he was actually involved myself.

Q So you felt that you had a good chance for acquittal?

A I thought I did, yes, ma'am.

Q Did you introduce any evidence in Mr. Douthit's behalf at trial?

A None whatsoever, other than cross-examining of the State's witnesses.

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Q Did you elicit any testimony concerning Mr. Douthit's character by way of cross-examination or otherwise?

A I believe one of the police officers, I'm not sure which one, I asked him if he had any records where Mr. Douthit had any prior arrests or anything. I believe at that time he went ahead and answered that he did not, but Mr. Darden had an objection and there was no further conversation along that line. But the jury did hear him answer that there wasn't -- that he had no record.

Q Did you present any argument at the sentencing phase of the trial after the conviction?

A My total argument at that time was that I had gotten a little upset with the jury coming back, and I told them -- my only argument was that they bring back whatever verdict they thought they could live with. Mr. Darden in his argument had argued to the jury that "they're going to get up here and they're going to beg for mercy and they're going to do this and that and the other," and I said, "No, we won't beg for mercy. You just bring whatever verdict you think your conscience will allow you to live with."

Q Do you think it would have been beneficial to make any further argument or present any additional evidence at that time?

A I don't know of any that I had at that time that I could have presented.

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Q Were you made aware of any character evidence that might have been available for Mr. Douthit?

A I don't know of any specific character evidence.

Q Do you think it would have been beneficial to have introduced any evidence as to, say, his general reputation in the community?

A Not that I know of. After this police officer had testified he had no record, I thought that was -- the jury heard that and I thought this was about all we could do.

Q Did you request a Jackson V. Denno hearing at the trial?

A No.

Q Why not?

A Well, my understanding of the Jackson V. Denno hearing is you are entitled to -- when there is a confession involved, and it was my knowledge there had been no confession involved in this case at all. Mr. Douthit certainly didn't confess to it.

Q Did Mr. Douthit make a statement?

A He had talked to the police officers but at no time did he tell them that he had any connection whatsoever with it.

Q Prior to trial were you made aware of any circumstances involving Mr. Douthit's statement that would have made you think that that statement was coerced?

A Not prior to trial, no, ma'am.

Q Were you ever made aware of any such circumstances?

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A Yes, ma'am. After the trial, and I would say possibly about two years, two and a half years ago, I spoke to Mr. Charles Norman one night and then went to his office within the next few days, and he told me at that time that he and Mr. Doug Williams, one of the detectives, were friends and that he could talk with Doug.

Q At that time had you been told that there was any --

A At that time I knew nothing about it. We were trying to see what we could find. Mr. Norman later came back and told me that he had talked with Mr. Williams and that he had lunch with him; and to start with Mr. Williams had said that he would tell him something but he wasn't to tell anybody. He told me that "I told Mr. Williams that if it was going to be in favor of Mr. Douthit not to tell me because I would use it." And he stated that Mr. Williams said, "Well, I'll just go ahead and tell you anyway." And at that time he told me what Doug Williams had told him, that the defendant, Delaney, while all three of the boys that were charged were in the room they had an electric cord wrapped around his neck with exposed ends and that all of them had been threatened that they would plug that cord in the wall socket if they didn't talk.

Q Had Mr. Douthit ever related this information to you?

A That's the first I knew of it.

Q And you did not know of it at any time prior to this incident with Mr. Norman?

A No.

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Q In regard to the search warrant and the information seized or brought to trial, did you object to the admission of any physical evidence at trial?

A I don't recall now. I don't remember.

Q Do you recall what was seized pursuant to the search warrant, the search warrant that the authorities say existed?

A That particular night they got the insurance policies from the trunk of Mr. Douthit's car. It's my understanding they got some blood samples from some, either from the wall or pieces of wood in the basement of the canine kennel, where they were that night -- now what happened I don't know.

Q Were those blood samples ever positively identified at trial?

A No, ma'am. On the extraordinary motion for new trial they called in a man from the State Crime Lab and he testified that they were compatible with Mr. Fraizer, the victim's, blood. That's all. He didn't testify at the trial.

Q At the conclusion of the trial in Cobb County, what action did you pursue in Mr. Douthit's behalf?

A After Mr. Erson testified that there was an insurance policy and that it was in effect through that date, that was January 28th I believe, I didn't know he was going to testify as to how it was paid for, and in my cross-examination I asked him how this policy was paid for and he told me it was paid for by an automatic deduction on my client's accounts in one or two banks, the First State Bank of Cobb County and the C&S National Bank. Well, this trial went over until about 10:30 at

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night. So the following day I went to both banks and asked them about Mr. Douthit's account. They both told me that they would not release that information to me since I had no authorization from Mr. Douthit. I went back to the trial judge and got him to sign an order ordering them to release the information to me. I carried it back and -- the reason for doing this, when Mrs. Foreman and her husband came to my office the first time, they had told me that Mr. Douthit had no bank accounts, they had been closed and he had no money. That was the reason that they and the grandmother were going to have to pay my fee. When I first talked to Mr. Douthit in jail he told me the same thing. So when I went to the banks the First State Bank of Cobb County told me that yes, Mr. Douthit had an account. In fact, they gave me an affidavit. He had an account there and it was closed in May of 1975. The C&S Bank said that yes, that he had two accounts, one in his name and one in the company name of, I believe it was Sweetwater Kennels, that the one in his name was closed in October of 1975 and the one in the company name was closed in November of 1975, and for the three or four months prior that there had been nothing paid to the Lincoln National Life Insurance Company. This we used as new evidence, as one of the grounds of new evidence in our motion for new trial. Of course, that was overruled by Judge Haynes.

Q After the motion for new trial did you file for direct appeal?

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A Yes, ma'am.

Q Were you appointed for that appeal?

A Yes, ma'am.

Q Could you tell the Court the result of that appeal?

A Well, the Supreme Court adopted almost the identical language Judge Haynes did in overruling the motion for new trial, and sustained it.

Q After the Supreme Court affirmed Mr. Douthit's case on direct appeal, did you participate in the case any further?

A Only as the, I guess an associate of Mr. Farmer.

Q Did you file a habeas corpus petition in Butts County?

A He and I together did, yes, ma'am.

Q And you participated in the initial --

A Well, I did file a motion for a stay with the Supreme Court. We did not file a certiorari -- I did not file a certiorari.

Q Do you recall why you did not file the certiorari initially?

A Well, Judge Haynes at that time, the trial judge, had a couple of heart attacks and had open heart surgery, and I don't know, it just kept lingering along, and it was over a year there that there was nothing done on the case at all.

Q So, no sentence had been imposed?

A No sentence had been imposed. In fact, the only reason that, so Judge Haynes told me, that there -- he knew a sentence a sentence was imposed was he made his secretary get all the death penalty cases that he had and bring them to him and he found

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Mr. Douthit's was just sitting there without a sentence, and this was a year and a half after the Supreme Court of Georgia had decided the case. At that time he set a new sentence.

Q Did you request assistance from other attorneys in preparing either the request for a stay or the habeas corpus petition?

A The habeas corpus, yes. I went to Mr. Farmer's office myself and he and I together did that.

Q Mr. Deal, do you recall any plea negotiations that were conducted in regard to Mr. Douthit's case?

A I don't believe there was any. Oh, I spoke with Mr. Darden about it but I don't believe he was interested in any plea bargaining at all at the time, and I don't know that we could have done it anyway because Mr. Douthit contended he was not guilty at all.

Q Were you aware of the fact that the State was seeking the death penalty in Mr. Douthit's case?

A Not until just prior to trial. I knew it within a week of the trial. Mr. Darden served me, had a hand-delivered ltter to me saying that he was going to ask, and setting out the grounds that he was going to ask for the death penalty on.

Q Did you actually feel that the case would get to the sentencing phase?

A I really didn't think so.

BY MS. WESTMORELAND: Those are all the questions I have.

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CROSS-EXAMINATION BY MR. NURSEY:

Q Mr. Deal, you testified that you were retained sometime between December 18th and Christmas of 1975, is that right?

A Yes, sir.

Q And Mr. Douthit told you the first time you talked to him about the bank accounts?

A That's right.

Q And what was --

A But he didn't tell me about particular accounts. He just said he did not have an account at the bank, that they had been closed.

Q Did you ask him what banks they were in?

A I believe we discussed the one at the First State Bank of Cobb County. I don't remember whether we discussed the C&S Bank or not.

Q What month was the trial in 1976?

A In January.

Q What part of January?

A The 27th and 28th.

Q So there was a little over a month then between the first time you talked with Mr. Douthit and the trial, is that correct?

A That's correct.

Q And during that time you never got the records on his bank accounts?

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A No, sir.

Q That is correct?

A That is correct. I did not get them.

Q You never filed a motion to suppress the evidence that was obtained from the search, did you?

A No, sir.

Q And you testified that you never had a copy of the search warrant?

A That's correct. I never saw a copy.

Q You made your decision not to file a motion to supppres without ever seeing the search warrant?

A That's right.

Q You said you didn't request the Jackson-Denno hearing -

BY THE COURT:

Q Before you respond, I have one question. Mr. Deal, why did you decide against filing a motion to suppress?

A Your Honor, I don't remember at this time just why.

Q Well, were you aware that there had been any kind of search?

A No, sir, I don't think so. I believe that Mr. Vining had said to me that he had gone to his automobile and gotten these things out of the trunk of his car himself. And as far as I know, there was nothing that they got out of that house down there that was used at the trial.

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BY MR. NURSEY:

Q Mr. Deal, they introduced a screen that was taken out of the basement, did they not?

A No, sir. I don't recall whether they did at the trial or not. I know the man from the Crime Lab that testified about t blood did not testify until the motion for new trial; but whether or not they introduced that screen at the trial, I could not answer.

Q Was there not testimony during the trial about blood being on the screen?

A There was testimony about there being blood, but --

Q And did they not have a blood expert at the trial testify that it was human blood?

A He could have. I don't recall.

Q There could have been?

A There could have, yes, sir.

Q And that was taken out of the basement of the kennel, that screen?

A I believe that's what they said.

Q You said you didn't ask for a Jackson-Denno hearing because there were no damaging statements, is that correct?

A I don't believe I said there were no damaging statements. I said because he had not confessed or claimed to have any part in it.

Q Would you admit that there were damaging statements?

A Mr. Nursey, I assume there was because the jury believed something to convict him of that, so I assume that there

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were possibly some damaging statement by that.

Q If the police claimed that Mr. Douthit told them where a gun was, would you not -- and that gun is being considered the murder weapon, would you not consider that a damaging statement?

A Possibly, and at the time Mr. Douthit explained the reason the gun was found at that particular place, and I thought it was a reasonable explanation.

Q Which Mr. Douthit never told at trial?

A No, he did not tell it.

Q But you would admit that at least it had potential for being damaging, you know, whether there was a credibility conflict or not, you admit there was a potential for it being a damaging statement concerning a gun?

A Yes, sir.

Q Mr. Deal, did you ever discuss with Ron Douthit his right to challenge the composition of the grand and traverse juries?

A I don't believe so.

Q You didn't?

A I don't believe I ever discussed that with him.

Q Isn't it true that you stated the reason you don't file those type challenges is that you think that when a black person is on trial white jurors are more sympathetic toward them?

A (No response.)

Q Have you not in the past stated the reason you don't file such challenges, challenge to the grand and traverse juries,

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is that when a black person is on trial you think white jurors are more sympathetic to them?

A No, I don't believe I have made a blanket statement. I think I told you and also Ms. Westmoreland in this particular case that had there been -- I mean I probably would not have -- I probably would have struck the two black jurors that were there if Mr. Darden had not done so because I have found that where I have represented black man and there were black jurors taken, that they were the first that wanted to convict him. In this situation, unless Mr. Douthit himself had insisted that we take the two black jurors and if we had had that opportunity that I probably would have struck them myself.

Q And you never informed him of his right to file such a challenge?

A I don't believe I discussed that with him at all.

Q And there was an all-white jury in this case?

A Sir?

Q There was an all-white jury in this case?

A Yes, sir. All the jurors picked were white, yes, sir.

Q And how many jurors out of the panel of 48 were black?

A All I remember is two out of the 48 jurors we had to strike from.

Q And Mr. Darden struck both of those?

A Yes, sir.

Q When the issue of Mr. Douthit testifying came up, you stated before that Mr. Douthit did what you would describe literally as begging to testify on the stand?

A That's correct, yes, sir.

Q He begged you to let him testify?

A He wanted to get on the stand, yes, sir.

Q And wanted to explain his innocence in this case?

A He didn't tell me what he wanted. He wanted to get up there. I assume that's what he wanted to do.

Q You have testified that you never filed a petition for writ of certiorari to the United States Supreme Court in this case as it was affirmed by the Georgia Supreme Court, is that right?

A Right.

Q And you said the reason you didn't do it is because there was no execution date set. The reason that you did not file certiorari was that there was no execution date set?

A I don't remember now what the reason was. I didn't do it anyway.

Q Didn't you just finish testifying on direct that Judge Haynes had had open heart surgery and did not set any dates in this case so --

A That was what happened, yes, but I don't know that that was the exact reason I didn't file any. I don't remember now why it wasn't filed. I did not file one.

Q Is it your opinion that an execution date needs to be set before certiorari can be filed?

A No, sir.

Q Mr. Deal, what evidence did you prepare for the penalty phase of this trial?

A I don't guess we prepared any because I didn't really think we were going to get that far, Mr. Nursey.

Q You didn't think there would ever be a penalty phase?

A No, sir.

Q Mr. Douthit had no prior record, is that correct?

A As far as I could determine he had none.

Q And the only evidence you place before the jury to let them know that was one question to a police officer asking him if his records reflected that Mr. Douthit had any record?

A The police station records, not his records.

Q That's the only evidence you presented to the jury on the issue of whether Mr. Douthit had no prior record?

A Yes, sir.

Q Did you ever go to Mr. Douthit's neighborhood and interview any of the people he grew up with?

A Well, I've gone to Mr. Douthit's neighborhood. Now, I don't know about people who grew up with him. I talked to some of the people who live in that neighborhood but -- like his grandmother and Mrs. Foreman, I talked to her down in that neighborhood, I talked to his aunt across the street, I talked to the dead man's mother, but I don't remember whether it was in that neighborhood or whether that was at the courthouse. I'm not sure about that. I talked to several people down there. Whether they were the ones that grew up with Mr. Douthit I don't know.

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Q You said that the only argument you presented to the jury during the penalty phase was "do what your conscience tells you is right." Am I more or less paraphrasing correctly?

A I just told them to bring back whatever verdict that their conscience would allow them to live with.

Q And you said at that time you were pretty upset with the jury after returning the guilty verdict?

A Right.

Q Did you request any kind of continuance to prepare evidence for the penalty phase?

A No, sir.

Q Did you request any kind of recess or continuance for your emotions to cool down for a little while?

A No, sir.

Q You stated that you didn't interview Mr. Erson before he testified at the trial, is that correct?

A That's correct.

Q The testimony that he gave took you by surprise, then, is that correct?

A The part about how this insurance policy was paid for did, yes, sir.

Q And if you had known before he was going to testify that he was going to testify to that, what would you have done?

A I would have had the bank records there.

Q And you would consider that properly representing Mr. Douthit, to bring in the bank records had you known Mr. Erson

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was going to say that?

A If I had known that's what he was going to testify to.

Q That would have been proper representation of Mr. Douthit to bring in those bank records?

A Sure it would.

Q Did you ask for a continuance after Mr. Erson testified to prepare the bank records?

A No, sir, I didn't.

Q Mr. Deal, were you aware of the fact that Ron regularly attended church at the Second St. John Baptist Church in Smyrna before he was arrested in this case?

A No, sir. He never mentioned church to me.

Q Are you aware that he had a good reputation in his community?

A Yes, sir. In fact, we had one of the jurors that was excused because he testified that his grandmother was a good friend of theirs and she visited in their home and had an excellent reputation, and that if he were chosen that he would be prejudice toward Mr. Douthit. When Mr. Darden asked the trial judge to do so, he excused him for cause.

Q Do you know that he used to drive his grandmother to church every Sunday and that he used to take his grandmother to the grocery store and other places all the time? Were you aware of that before the trial?

A No, sir.

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Q And were you aware that he used to help out people in the neighborhood doing the yard work for them and running errands for them and things like that?

A I don't know about yard work and running errands. He apparently was helpful around there to different people. I don't know any specific chores.

Q You knew that he had no prior record?

A I had not found any. He told me he didn't have any and I didn't find any from the -- by talking with Mr. Darden. They couldn't come up with any rap sheets where he had a record.

Q And did you know that he had been employed pretty regularly since high school, worked after school and then after he graduated he was employed fairly regularly?

A No. It seems to me like it's -- and my information was that he had not been employed too regularly and that he had a lot of different jobs.

Q But he kept a job; was always working and supporting himself and helping his grandmother?

A I don't know about that.

Q You didn't know about that?

A No, I didn't.

Q You were aware that he tried to help organize like baseball games and other activities for children in the neighborhood and in his community?

A No, sir, he didn't mention that to me.

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Q You weren't aware of that?

A No, sir.

Q Do you think that some of that information might have led the jury to look upon Ron a little bit more favorably and maybe have spared his life?

A No, sir, I really don't, Mr. Nursey, because all that jury heard from Mr. Darden was that "here's a man that killed to collect an insurance policy," when actually there wasn't an insurance policy. I don't think anything that he could have said, even if he had testified, I don't believe it would have changed that jury's mind.

Q And that's all the jury knew about --

A That's all they knew about, just the fact that he had -- Darden said, and all the testimony that was elicited from the people to explain to them that this man killed to collect an insurance policy.

Q And all their knowledge of his character was a man who killed to collect an insurance policy?

A Except that they had this statement by the officer that he found no record.

BY MR. NURSEY: I don't have any other questions.

BY MS. WESTMORELAND: We have no further questions.

BY THE COURT: Thank you, Mr. Deal. You may step down. Do you have other witnesses?

BY MS. WESTMORELAND: No, Your Honor, we have no other witnesses.

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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

81-5026

RONALD DOUTHIT,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of Butts County, Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

JOHN C. WALDEN
Senior Assistant
Attorney General
Counsel of Record for
Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

MARY BETH WESTMORELAND
Assistant Attorney General

132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3353

QUESTION PRESENTED

1.

Whether the Petitioner received effective assistance of counsel before trial, during the trial and during the sentencing phase of the trial as found by the State habeas corpus court?

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Carbo v. United States, 581 F.2d 91 (5th Cir. 1978). . 15

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RONALD DOUTHIT,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of Butts County, Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Ronald Douthit, was indicted in Cobb County, Georgia, for the murder of Leonard Karl Frazier. Petitioner was tried by a jury and found guilty of murder. Petitioner was sentenced by the jury to the death penalty based on a finding that the offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value. Ga. Code Ann. § 27-2534.1(b)(4).

Although a detailed statement of facts was set forth by the Supreme Court of Georgia on its initial direct review of Petitioner's conviction, Respondent sets forth the following brief statement for this Court's consideration. The body of Leonard Karl Frazier was discovered in Smyrna, Georgia, on December 17, 1975. Three bullets were recovered from the victim's head during the autopsy. During the investigation of the case, the police learned that the Petitioner and the victim were cousins and that the Petitioner had employed the victim. The evidence submitted at trial showed that the

Petitioner had procured an insurance policy on the life of the victim. Police authorities seized a .22 caliber pistol from the Petitioner. A comparison revealed that at least one of the bullets found in the body of the victim had been fired from that gun. Douthit v. State, 239 Ga. 81, 82, 235 S.E.2d 493 (1977).

Testimony was introduced concerning the Petitioner's interest in insurance policies and the Petitioner's discussing insurance with certain insurance agents. Evidence was introduced to show that the Petitioner had told one individual that he had insurance on his cousin and wanted another policy with double indemnity. Another insurance agent testified that he had written a $15,000.00 life insurance policy with double indemnity on the life of the victim at the Petitioner's request. The agent testified that someone later called him and stated that he was Leonard Frazier and that he wanted the beneficiary of the policy changed to Ronald Douthit. Douthit, supra at 83.

At the hearing on the motion for new trial, the Petitioner contended that the insurance policy was invalid as the premiums were paid by checks on bank accounts which had been closed. The Petitioner contended that, as the insurance company considered the policy not to be in force, there was no motive for the crime. The Supreme Court of Georgia considered this point on direct appeal and stated, "The life insurance policy was obtained by the Defendant [Ronald Douthit], it was in his possession, he had been named the beneficiary less than two weeks earlier, and he had checked to find out that the change in beneficiary had in fact been made." Douthit, supra at 86. That Court also noted that

the insurance company had been seeking payment of the premiums even after the homicide occurred. Thus, the Court concluded that it appeared that the Petitioner at least thought that the policies were in force; therefore, there was sufficient evidence to show a motive based on the insurance policies.

According to police authorities, Petitioner stated that his co-indictee, Rodney Dulaney, shot the victim while the Petitioner was across the street. The Petitioner admitted assisting in moving the body and putting the body alongside the road so that it would be found. It should also be noted that Rodney Dulaney later testified at a hearing on an extraordinary motion for new trial that he did not kill the victim.

The Supreme Court of Georgia cited the holding of the trial court in denying Petitioner's original motion for new trial and held, "A finding by the jury that Douthit, if not the slayer, was the 'master mind' of the crime, was warranted." Douthit, supra at 84. The Supreme Court of Georgia also upheld the conviction and death penalty. No petition for certiorari was filed from that decision.

Petitioner subsequently filed a petition for a writ of habeas corpus in the Superior Court of Butts County. That Court dismissed the petition due to the issues raised so that the Petitioner could file an extraordinary motion for new trial in the Superior Court of Cobb County.

At the hearing on the extraordinary motion for new trial in the Superior Court of Cobb County, Petitioner attempted to show that he was not the triggerman in the murder of Leonard Frazier, but that Rodney Dulaney actually shot Frazier. Petitioner produced his co-indictee, Rodney Dulaney, as a witness in Petitioner's behalf. Dulaney testified that the Petitioner shot Frazier, although Dulaney did admit being

present in the house when the shooting took place. Petitioner testified before the Court that he did not shoot Leonard Frazier.

The Superior Court of Cobb County denied the extraordinary motion for new trial. The Court found that the first three grounds had been raised in the original direct appeal to the Supreme Court of Georgia. The Court also found that there was no evidence introduced in support of the claim that Petitioner was not the triggerman. The Court also noted that this would not necessarily constitute newly discovered evidence so as to justify the granting of an extraordinary motion for new trial.

Petitioner appealed from the ruling of the Court to the Supreme Court of Georgia. That Court affirmed the lower court's ruling and held that there was no basis for granting the extraordinary motion for new trial. A petition for certiorari was subsequently filed challenging both the decision of the Supreme Court of Georgia on direct appeal and the decision following the extraordinary motion for new trial. This Court denied certiorari on March 17, 1980. Douthit v. State, 244 Ga. 471, 260 S.E.2d 875 (1979), cert. denied 445 U.S. 938 (1980).

Petitioner then filed the instant petition for a writ of habeas corpus in the Superior Court of Butts County. In that petition, Petitioner raised among other issues the effectiveness of his counsel during all phases of his trial. In the Superior Court it was found that there was no merit to any of the allegations raised by the Petitioner and denied habeas corpus relief on November 14, 1980. The application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on April 13, 1981.

Petitioner has now filed the instant petition for a writ of certiorari in this Court challenging the findings of the Superior Court of Butts County concerning the effectiveness of his trial counsel.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE SUPERIOR COURT OF BUTTS COUNTY APPLIED THE PROPER STANDARD AND CORRECTLY DETERMINED THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING ALL PHASES OF HIS TRIAL.

In the Superior Court of Butts County, Petitioner listed some thirteen grounds alleging ineffective assistance of counsel. Petitioner has again raised this issue before this Court enumerating approximately the same allegations concerning his counsel's performance in his behalf. Respondent submits that the Superior Court of Butts County applied the proper standard and correctly determined that Petitioner received effective assistance of counsel.

The Superior Court of Butts County applied the standard set forth by the Fifth Circuit Court of Appeals and the Supreme Court of Georgia in considering the effectiveness of Petitioner's counsel, that is, effective assistance of counsel means "Not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 286 F.2d 592, 599 (5th Cir. 1970); Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974). Thus, the Superior Court of Butts County properly applied federal constitutional principles to the facts in the instant case.

In considering the allegation of ineffective assistance of counsel, it is necessary to consider the facts and circumstances surrounding the representation of the Petitioner. Petitioner's family was referred to Mr. Eugene Deal early in the case as an attorney to represent the Petitioner. Petitioner's sister discussed the case with Mr. Deal before Petitioner was arraigned and paid Mr. Deal a portion of the fee. Mr. Deal subsequently talked to the Petitioner's grand-

mother and with Petitioner. Mr. Deal was made aware of the fact that Petitioner did not have any money, but that Petitioner's family would pay for Mr. Deal's services.

Mr. Deal testified at the State habeas corpus hearing that he made a motion to sever Petitioner's case from that of his co-defendant and filed a Brady motion to obtain the file of the District Attorney. He had access to everything that was in the file of the District Attorney at the time of the Brady motion. Mr. Deal talked with Petitioner and members of Petitioner's family on several occasions and was well aware of the facts involved in the case. The only witness Mr. Deal was unable to talk with before trial was the insurance agent from Indiana, Roy Ursin. Mr. Deal testified that he felt that the Petitioner would not be convicted based on the evidence that he knew was available to the District Attorney and that he felt certain that the case would never reach the penalty phase.

From the evidence submitted at the habeas corpus hearing and from the transcript of Petitioner's trial, it can be seen that Mr. Deal conducted an extensive voir dire examination of the potential jurors, questioning them concerning their possible prejudice based on publicity or on Petitioner's race. Mr. Deal also made numerous objections to evidence at trial and cross-examined the witnesses of the State. A detailed closing argument was presented on behalf of the Petitioner by Mr. Deal. A brief argument was made by Mr. Deal at the conclusion of the penalty phase of the trial at which time he asked for mercy for his client.

Since the time of the trial, Mr. Deal has filed a direct appeal for the Petitioner raising several allegations in the Supreme Court of Georgia. Mr. Deal also participated in the filing of Petitioner's first habeas corpus action as well as in the filing of the extraordinary motion for new trial in the Superior Court of Cobb County. Thus, Mr. Deal

did not abandon his client, but continued to work zealously in his behalf even after the Petitioner had been convicted.

Mr. Deal also testified before the habeas corpus court that he had considerable experience in criminal cases. He has been in practice since 1965 and some fifty percent of his practice has involved criminal cases. Thus, Petitioner's retained attorney was knowledgeable and experienced in the field of criminal law.

Several of Petitioner's allegations concerning ineffective assistance of counsel relate to the motive for the crime, that is, the possession of an insurance policy on the life of the victim. Petitioner asserts that his counsel did not investigate the insurance motive theory and did not interview Mr. Roy Ursin prior to trial.

Mr. Deal testified at the State habeas corpus hearing that he knew that Petitioner did not have any money and that Petitioner's bank accounts were closed. Mr. Deal testified that he did not know that the insurance agent would testify at trial that the premiums were paid by automatic bank check. Petitioner was aware of this information and could have made it available to his counsel prior to trial. Mr. Deal did not have a chance to discuss this with the witness prior to trial and did not have the evidence available to him. He only knew that the insurance agent would testify that there was an insurance policy. He did not see any need to interview the agent as he thought he knew all of the testimony that the agent would relate.

Mr. Deal also testified that he thought the Petitioner was not guilty and that the jury would find him innocent even after the testimony of the insurance agent. Furthermore, evidence introduced at trial showed that two of the premiums

on the insurance policy had been returned unpaid, but the insurance company was still seeking payment at that time. Petitioner criticizes his attorney for not determining that the insurance policy was not in effect at the time of trial and not obtaining records to rebut this testimony. However, as noted by the State habeas corpus court, "Even assuming trial counsel had produced evidence showing that the policy was not in effect at the time of the murder, the jury would still have been authorized to find that the Petitioner was not aware of this fact." (Habeas Corpus Order 5). The critical fact was whether the Petitioner believed the policy to be in effect. The habeas corpus court properly found that the failure of trial counsel to find and produce the evidence could not have been said to have made any difference in the outcome of the trial. Furthermore, "Petitioner has not demonstrated that his counsel could likely have discovered what the witness and the District Attorney did not - that the policy was not in effect at the time of the murder." (Habeas Corpus Order 6). The fact that the policy was invalid was not discovered by anyone until some months after the trial had been concluded. Therefore, it could hardly be said that counsel's action was ineffective in failing to discover what no one else was able to discover at the time of the trial.

Petitioner also asserts that his counsel was ineffective in failing to file motions to suppress his statements and suppress evidence obtained from a search warrant. As noted previously, Mr. Deal did file a Brady motion and a motion for severance, both of which were granted prior to trial. From Mr. Deal's testimony and conduct at trial, it is clear that he did investigate the case and was well acquainted with the facts before trial. The only information he had not obtained was the actual search warrant itself and the information from the insurance agent that the policies were paid by automatic bank checks. As of the present date, a search warrant has still not been produced, although various

officers did testify that the warrant was in existence.

There was also sufficient evidence to show that Petitioner's arrest was legal and that there was no illegal search and seizure conducted. The testimony at trial showed that a search warrant was issued based on information supplied by the police officers. The officers testified that at the time of the murder, they discovered that there were two brothers of the victim in the Cobb County Jail. They obtained statements from both of these individuals implicating Petitioner and Rodney Dulaney. The officers obtained a search warrant pursuant to their information to search the residence where Petitioner and Dulaney resided. When the officers went to the residence, there was no one present. Petitioner and his co-defendant arrived as the officers were conducting the search.

Only one item was actually removed from Petitioner's residence, that is, a strip of metal from a screen in the basement. The Petitioner pointed this out to the police himself when he showed them where his co-defendant allegedly shot the victim. The only other item obtained as a result of the search warrant was the insurance policy on the life of Leonard Frazier. This policy was not removed from the residence, but was removed from the trunk of the Petitioner's car. Petitioner voluntarily told a police officer where the policy was and turned it over to them. Under these facts, it is clear that there was actually no search as the Petitioner pointed out all the items to the police officers. There was probable cause to make the search pursuant to the warrant, but this was not even necessary. Thus, as there was no illegal search and seizure, there could be no ineffective assistance of counsel due to Mr. Deal's failure to file a motion to suppress.

Respondent further asserts that there was no illegal arrest as the officers had probable cause to arrest the Petitioner based on the insurance policy on the life of the victim and the knowledge that the Petitioner was named as beneficiary on that policy. Furthermore, they had other statements implicating the Petitioner and Rodney Dulaney. Petitioner did make a statement to the authorities which was not objected to at trial when it was introduced. In considering all the evidence introduced at trial and at the hearing on the extraordinary motion for new trial, it is clear that the statements made by the Petitioner were voluntary. None of the allegations made by the Petitioner in which he asserts that he was threatened or that threats were used against his co-defendant have ever been substantiated in any regard. Mr. Deal testified before the State habeas corpus court that Petitioner never told him of any alleged threats or of any coercion used to get him to make a statement. Only after the direct appeal had been completed was Mr. Deal aware of any alleged threats that had been made. Thus, Mr. Deal could have seen no reason to argue that the statements be suppressed. Mr. Deal also testified that in his opinion the statements did not amount to a confession in that the Petitioner only told the police where the gun could be located and that he did not participate in the shooting.

Absent a showing that the statement made by the Petitioner was involuntary, Respondent asserts that there could be no ineffective assistance of counsel based on the failure to request a Jackson v. Denno hearing. Furthermore, the statements were actually exculpatory and did not rise to the level of a confession. Mr. Deal exercised his judgment and determined that there was no need to request a Jackson v. Denno hearing or challenge the admissibility of Petitioner's statements.

Petitioner also asserts that his counsel took a pro forma approach to his trial and did not present any evidence in his behalf. Clearly, no witnesses were called at the trial in Petitioner's behalf. Mr. Deal testified that he knew that Petitioner did not have any money and that Petitioner's bank accounts were closed, but that he did not know that the insurance agent would testify that the premiums were paid by automatic bank check. Had Petitioner made this information available to counsel prior to trial, Mr. Deal could have procured this information in time to have it produced at trial. Mr. Deal continually thought that Petitioner would not be convicted as he did not believe there was sufficient evidence presented against Petitioner. Evidence was introduced at trial showing that two of the premiums of the policy had been returned unpaid, even though the insurance company was still seeking payment at that time. Furthermore, as previously noted, the insurance company considered the policy to be in effect at the time of the trial and did not discover that the policy was not in effect until two months after the trial had been concluded. Petitioner could hardly expect his attorney to discover what the insurance company and the District Attorney could not have discovered. As noted by the habeas corpus court, Petitioner did not demonstrate that his counsel could have discovered what the insurance company and the District Attorney could not. Petitioner has shown no evidence that his counsel could have introduced in his behalf that would have tended to show his innocence in this matter.

Petitioner asserts that his counsel was ineffective in that he only conducted a general voir dire examination. In reading the voir dire examination conducted by Petitioner's attorney, it can be seen that he asked numerous questions of each juror. He asked various jurors if they had ever been

acquainted with the victim or his family. He asked jurors if they had relatives that were police officers or if they had knowledge of any of the District Attorney or of his staff. Several jurors were questioned concerning possible effects of publicity and numerous jurors were questioned to see if they would show any bias to the defendant because he was black. Based on the evidence found in the trial transcript, it is clear that the voir dire conducted by Mr. Deal was meaningful and sufficient to make an intelligent jury selection. Mr. Deal also testified at the State habeas corpus hearing that as far as he could tell he thought that he had obtained an impartial jury. (H.T. 82).[1/]

Petitioner also asserts that his counsel was ineffective because he waived his right to make an opening statement. Petitioner's counsel requested that he be allowed to reserve his opening until after the State had presented its evidence. The trial court exercised its discretion and required Mr. Deal to present his opening statement before any evidence was presented or waive such statement. Mr. Deal testified at the habeas corpus hearing that he felt it would be better for him not to make any opening statement at all. Clearly, this is a tactical decision on the part of counsel for the Petitioner and did not amount to ineffective assistance of counsel. Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977).

Petitioner also asserts that his trial counsel did not allow him to testify at trial. Mr. Deal testified at the habeas corpus hearing that Petitioner wanted to testify, but the District Attorney was a very experienced trial attorney. He did not feel that Petitioner would be able to withstand cross-examination by the District Attorney. According to Mr. Deal he and Petitioner's sister talked the Petitioner out of

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1/ H.T. refers to the transcript of Petitioner's State habeas corpus hearing.

testifying. Clearly, this is a tactical decision on the part of trial counsel. He obviously informed the Petitioner of his reasons and encouraged the Petitioner not to testify. This does not constitute ineffective assistance of counsel. See Pittman v. State, 149 Ga. App. 729, 256 S.E.2d 67 (1979).

Petitioner's remaining allegations deal with trial counsel's preparation for the penalty phase of the trial. Petitioner asserts that Mr. Deal could have introduced evidence pertaining to Petitioner's good character and reputation in the community. Petitioner submitted affidavits and testimony on this point.

Mr. Deal's main point in regard to presenting mitigating evidence was that he did not think that the trial would ever get to the sentencing phase. The State did not introduce any new evidence in aggravation at the sentencing phase and, thus, Mr. Deal did not feel that any mitigating evidence introduced by the Petitioner would have been helpful. The sole aggravating circumstance relied on by the State was the fact that the killing was done for the purpose of obtaining money. This had already been proven at the trial. As the jury had already determined that the aggravating circumstance existed, it was clear that they had also already determined that there was evidence that would justify their imposition of the death penalty. Furthermore, one witness at trial did indicate that Petitioner did not have any prior convictions. Although in hindsight, Petitioner may argue that his counsel could have done additional things in his behalf, this is not sufficient to render his performance ineffective. It was noted by the State habeas corpus court, "Measuring Petitioner's representation against the standard for handling death cases in Georgia, of which this Court has seen many, the Court cannot conclude that Petitioner's representation was so ineffective that his constitutional rights were denied. Most counsel in these

cases do not offer evidence during the sentencing phase. The Court cannot say it is likely that the evidence proffered at the habeas hearing would have made any difference in the jury's sentence. (See H.T. pp. 93-95, 98)." (Habeas corpus order at 7). The Court went on to note that it could not say that a more lenghthy argument on the issue of punishment would have been likely to produce a different result.

Claims of ineffective assistance of counsel require an inquiry into the actual performance of counsel and then a determination of whether the performance constituted reasonably effective assistance based on the totality of the circumstances. Carbo v. United States, 581 F.2d 91, 92 (5th Cir. 1978). The mere fact that present counsel would have acted differently at the time of trial is not sufficient to render trial counsel ineffective. Futhermore, where an allegation of ineffective assistance of counsel is based on specific acts or omissions of counsel, "The allegations must be buttressed by a showing of injury or prejudice to the defendant." Lovett v. Florida, 627 F.2d 706, 710 (5th Cir. 1980), quoting Ewing v. Williams, 596 F.2d 391, 395 (9th Cir. 1979). Thus, Petitioner has not shown any way in which his constitutional rights have been violated as he has not shown that he received ineffective assistance of counsel. Therefore, no constitutional question is presented for review by this Court.

CONCLUSION

For the above and foregoing reasons Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Ronald Douthit.

Respectfully submitted,

JOHN C. WALDEN
Senior Assistant
Attorney General
Counsel of Record for
Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

MARY BETH WESTMORELAND
Assistant Attorney General

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3353

CERTIFICATE OF SERVICE

I, John C. Walden, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States Mail with proper address and adequate postage to:

Mr. Joseph M. Nursey
Attorney at Law
15 Peachtree Street, N.E.
Suite 831
Atlanta, Georgia 30303

This 6th day of August, 1981.

JOHN C. WALDEN